EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
MAY 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-1538

IN THE

SUPREME COURT OF THE UNITED STATES

1987 TERM

No. 86-1538

NEW YORK,

Petitioner,

-against-

ROBERT MOSLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PHILIP L. WEINSTEIN
Attorney for Respondent
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420

KAREN M. KALIKOW
Of Counsel

QUESTION PRESENTED

Whether this Court lacks jurisdiction to review the New York Court of Appeals decision, as it rested upon the construction and application of a state statute, and otherwise rested on adequate and independent state grounds.

TABLE OF CONTENTS

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 1

SUMMARY OF ARGUMENT..... 2

STATEMENT OF THE CASE..... 3

ARGUMENT IN OPPOSITION TO THE PETITION..... 5

POINT

THIS COURT LACKS JURISDICTION TO REVIEW THE NEW YORK COURT OF APPEALS DECISION, AS IT RESTED UPON THE CONSTRUCTION AND APPLICATION OF A STATE STATUTE, AND OTHERWISE RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS..... 5

CONCLUSION..... 11

TABLE OF AUTHORITIES

CASES — Page

Alderman v. United States, 394 U.S. 165 (1968)..... 5

Michigan v. Long, 463 U.S. 1032 (1983)..... 10

People v. Cantor, 36 N.Y.2d 106, 324 N.E.2d 872 (1975)..... 4, 8 n.4

People v. Cefaro, 21 N.Y.2d 252, 234 N.E.2d 423 (1967)..... 5

People v. Chapman, 95 A.D.2d 782, 463 N.Y.S.2d 266 (1983)..... 4, 8 n.4

People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562 (1976)..... 4, 8 n.4

People v. Diaz, 41 A.D.2d 382, 343 N.Y.S.2d 474 (1973), aff'd, 34 N.Y.2d 689, 312 N.E.2d 478 (1974)..... 6

People v. Hadley, 67 A.D.2d 259, 415 N.Y.S.2d 719 (1979)..... 6

People v. Johnson, 64 N.Y.2d 617, 474 N.E.2d 241 (1984)..... 9 n.5

People v. Knapp, 52 N.Y.2d 689, 422 N.E.2d 531 (1981)..... 9 n.5

People v. Lynch, 116 A.D.2d 56, 500 N.Y.S.2d 236 (1986)..... 6

People v. Millan, __ N.Y.2d __, __ N.E.2d __ (No. 76, May 7, 1987)..... passim

People v. Mosley, 68 N.Y.2d 881, 501 N.E.2d 580, reh'g denied, 69 N.Y.2d 707, __ N.E.2d __ (1986)..... passim

People v. Persce, 204 N.Y. 397, 97 N.E. 877 (1912)..... 6

CASES — Page

People v. Reisman, 29 N.Y.2d 278, 277 N.E.2d 396 (1971), cert. denied, 405 U.S. 1041 (1972)..... 6

People v. Stith, 69 N.Y.2d 313, __ N.E.2d __ (1987)..... 7 n.3, 9 n.5

People v. Tutt, 38 N.Y.2d 1011, 348 N.E.2d 920 (1976)..... 9 n.5

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendments IV, XIV... 2

New York Constitution, Article I, Sections 6, 12..... 1

28 U.S.C. §1257(3)..... 1

22 N.Y. Admin. Code §500.4..... 4

N.Y. Crim. Proc. Law §470.05..... 9 n.5

N.Y. Penal Law §10.00(8)..... 2, 5, 6

N.Y. Penal Law §265.15(3)..... 7

BRIEF IN OPPOSITION TO

PETITION FOR CERTIORARI

Respondent requests that this Court deny the petition for a writ of certiorari to review the judgment of the New York Court of Appeals, entered in the instant case on October 16, 1986. People v. Mosley, 68 N.Y.2d 881, 501 N.E.2d 580, reh'g denied, 69 N.Y.2d 707, ___ N.E.2d ___ (1986).

JURISDICTION

Petitoner asserts that this Court has jurisdiction under 28 U.S.C §1257(3). Respondent claims that this Court lacks jurisdiction because the judgment of the New York Court of Appeals was based upon adequate and independent state grounds.

CONSTITUTIONAL PROVISIONS INVOLVED

The New York Constitution, article 1, section 6, provides, in pertinent part:

> No person shall be deprived of life, liberty or property without due process of law.

The New York Constitution, article I, section 12, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The United States Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The United States Constitution, Amendment XIV, provides, in pertinent part:

> No state shall...deprive any person of life, liberty, or property, without due process of law. . .

SUMMARY OF ARGUMENT

Petitioner's claim that the New York Court of Appeals decision below erroneously revived the doctrine of automatic standing, in contravention of federal constitutional principles, rests on a complete misreading of that decision. For, rather than depart from traditional rules granting standing to challenge a search or seizure to one in possession of the item searched or seized, the Mosley Court simply applied those rules to someone who, under state law of constructive possession [N.Y. Penal Law §10.00(8)], was in fact deemed to "possess" the item seized. The Court's application of its own penal law definition is purely a question of state law. Further, the recent case of People v. Millan, __ N.Y.2d __, __ N.E.2d

__ (No. 76, May 7, 1987), confirms both that the Mosley decision did not concern, let alone revive, automatic standing, and that it rested on an adequate and independent state constitutional ground.

STATEMENT OF THE CASE

Respondent accepts the statement of facts in this case from the decision of the New York Court of Appeals (A. 1a-2a).[1] In addition, respondent notes that at no point in the hearing did the prosecutor argue that respondent did not have standing to attack the frisk of his companion, Mackie. However, the hearing court sua sponte ruled that whether or not the initial frisk of respondent was justified was irrelevant since nothing was recovered at that point and that respondent did not have standing to challenge the frisk of his companion which revealed a starter's pistol (A. 7a).

Respondent pled guilty to criminal possession of a weapon in the third degree and was sentenced to five years' probation and fined $500 (Minutes of Sentence, dated September 5, 1984, p. 3).

On appeal to the New York Supreme Court, Appellate Division, First Department, respondent's conviction was affirmed without opinion (A. 4a). The New York Court of

---

[1] References are to the Appendix annexed to the petition for a writ of certiorari.

Appeals reversed the judgment of conviction on October 16, 1986. Citing People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562 (1976); People v. Cantor, 36 N.Y.2d 106, 324 N.E.2d 872 (1975); and People v. Chapman, 95 A.D.2d 782, 463 N.Y.S.2d 266 (1983), the Court held that the weapon recovered and the statement obtained from respondent at the stationhouse should have been suppressed since the stop and frisk of respondent was unjustified and, therefore, there was no probable cause to arrest and search him. The Court then reasoned that "[i]nasmuch as the People rely on the discovery of the starter pistol on Mackie as the basis for the arrest of [respondent] -- that [respondent] constructively possessed the weapon concealed on Mackie's person -- [respondent] has standing to contest the frisk of Mackie" (A. 2a).[2] In November, 1986, petitioner moved for reargument or reconsideration of the Court's decision on the ground that the Court of Appeals erroneously relied upon the "previously defunct rule of automatic standing." On December 18, 1986, the Court denied petitioner's motion (A. 3a).

---

[2] The People did not argue in their brief in the Appellate Division or in their submission, pursuant to 22 N.Y. Admin. Code §500.4, in the Court of Appeals, that respondent lacked standing to contest the lawfulness of the police conduct.

ARGUMENT IN OPPOSITION TO THE PETITION

POINT

THIS COURT LACKS JURISDICTION TO REVIEW THE NEW YORK COURT OF APPEALS DECISION, AS IT RESTED UPON THE CONSTRUCTION AND APPLICATION OF A STATE STATUTE, AND OTHERWISE RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Petitioner seeks to have this Court review a question of pure state law, namely, whether one who constructively possesses property, pursuant to N.Y. Penal Law §10.00(8) and state decisional law, possesses that property for purposes of standing. To achieve that end, petitioner construes the New York Court of Appeals decision in People v. Mosley, 68 N.Y.2d 881, 501 N.E.2d 580, reh'g denied, 69 N.Y.2d 707, ___ N.E.2d ___ (1986), to enunciate a new rule of standing, which "resurrects the automatic standing doctrine" and thus misinterprets the federal constitution (Petition for Cert. at 5-6). To the contrary, the New York Court of Appeals did not enunciate a new standing rule but rather, simply applied a well-established standing rule to the New York doctrine of constructive possession.

It is axiomatic that, under both federal and state authorities, one who physically possesses property has standing to challenge the seizure of that property by the police. Alderman v. United States, 394 U.S. 165, 171-73 (1968); People v. Cefaro, 21 N.Y.2d 252, 257, 234 N.E.2d

423, 425-26 (1967). Under N.Y. Penal Law §10.00(8), one possesses property when he has "physical possession or otherwise exercise[s] dominion or control over tangible property." New York Law thus does not differentiate between physical possession and constructive possession for purposes of defining criminal conduct involving possession of contraband. E.g., People v. Diaz, 41 A.D.2d 382, 384, 343 N.Y.S.2d 474, 476-78 (1973), aff'd, 34 N.Y.2d 689, 312 N.E.2d 478 (1974); People v. Reisman, 29 N.Y.2d 278, 285, 277 N.E.2d 396, 400 (1971), cert. denied, 405 U.S. 1041 (1972); People v. Persce, 204 N.Y. 397, 402, 97 N.E. 877, 878 (1912); People v. Lynch, 116 A.D.2d 56, 61, 500 N.Y.S.2d 236, 239 (1986); People v. Hadley, 67 A.D.2d 259, 262-63, 415 N.Y.S.2d 719, 721 (1979).

Since, by operation of state law, a "constructive possessor" has the same possessory interest in, and nexus to, the property as one having actual possession, there is similarly no distinction that can be made for purposes of standing. In short, the Mosley Court simply recognized that, as respondent was alleged to have been the possessor of the seized property (Mackie's gun), he had standing, in its most traditional sense, to challenge the seizure of the property he was deemed to possess. Automatic standing, which confers rights on someone with no recognized possessory interest, was simply not involved in the Court's decision.

This analysis has recently been confirmed in People v. Millan, __ N.Y.2d __, __ N.E.2d __ (No. 76, May 7, 1987).[3] There, the defendant was charged with possession of a weapon found in a taxicab in which he was a passenger, under New York's presumption of possession embodied in N.Y. Penal Law §265.15(3). Citing Mosley, inter alia, in support, the Court both reaffirmed that automatic standing is no longer the rule in New York and that, since constructive or presumptive possession constitutes possession under New York law, such possession suffices for purposes of traditional standing. Slip op. at 4-6. The Court explained that, unlike automatic standing, which confers a right to contest the legality of a search simply by virtue of a defendant being charged with a possessory crime, in Millan, the defendant's right to question the legality of the search arose from his nexus to the seized property which "rest[ed] entirely on the circumstances giving rise to the presumption." Id. at 5.

Petitioner's claim that the doctrine of automatic standing is at issue is viable only if this Court were to find that constructive possession is not the functional equivalent of actual possession, and it is this underlying question that petitioner really seeks to have this

---

[3] For the convenience of the Court, the unreported decision in Millan and the decision in People v. Stith, 69 N.Y.2d 313, __ N.E.2d __ (No. 78, March 28, 1987), are enclosed with this brief.

Court review. However. the determination as to what constitutes possession under state law, like any other definition pertaining to crimes the state chooses to penalize, is the exclusive prerogative of the state courts and legislature. Whether "possession" includes constructive or presumptive possession or, indeed, any other legal fiction, is thus purely a matter of state law, beyond the review of this Court.[4]

Once the premise that constructive possession is the functional equivalent of physical possession under New York law is accepted, it becomes apparent that the doctrine of automatic standing was irrelevant to the decision in Mosley. And, once it is further acknowledged that such definition is exclusively a matter of state law, it becomes apparent that petitioner's attempt to characterize the Mosley decision as the enunciation of a new standing rule is an attempt to avert this Court's attention from the adequate and independent state ground upon which Mosley truly rested.[5]

---

[4] Petitioner seeks to federalize its claim by referring to the Mosley Court's reliance on People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562 (1976), People v. Cantor, 36 N.Y.2d 106, 324 N.E.2d 872 (1975); and People v. Chapman, 95 A.D.2d 782, 463 N.Y.S.2d 266 (1983), and stating that those cases, in turn, relied on federal law. However, the New York Court of Appeals cited those cases for the substantive proposition that the stop and frisk of respondent was unjustified and they are thus completely irrelevant to the standing issue.

[5] To the extent that petitioner seeks to convert the decision in Mosley into a resuscitation of automatic

(Footnote Continued)

Furthermore, although traditional rules of standing are based on federal and state authorities, Millan, slip op. at 6, Millan expressly held that its application of standing rules to cases involving constructive or presumptive possession independently rested on state constitutional grounds. For example, it held that to allow the "legal fiction of constructive possession" to suffice as a basis for prosecuting a person for a crime, but not simultaneously suffice as a basis for standing, would offend "fundamental tenets of fairness inherent in New York criminal jurisprudence," with the Court citing expressly and only to the state constitution and state case law. Id. at 6. Elsewhere, the Court expressly held that its

---

(footnote continued)

standing, this claim is barred on state procedural grounds as well. Because the State did not argue at the suppression hearing (nor even before the Appellate Division or Court of Appeals) that respondent lacked standing to contest the frisk of his companion, respondent had no opportunity to meet that claim in the fact-finding court, and the State thereby waived that issue for appellate review. N.Y. Crim. Proc. Law §470.05(2); People v. Stith, 69 N.Y.2d 313, 320, __ N.E.2d __ (1987); see People v. Johnson, 64 N.Y.2d 617, 619 n.2, 474 N.E.2d 241, 242-43 n.2 (1984); People v. Knapp, 52 N.Y.2d 689, 699, 422 N.E.2d 531, 536-37 (1981) (Jasen, J., concurring); People v. Tutt, 38 N.Y.2d 1011, 1012-13, 348 N.E.2d 920, 920-21 (1976). That the hearing court ruled that respondent lacked standing did not preserve the issue as a question of law for appellate review, despite the August 2, 1986 amendment to N.Y. Crim. Proc. Law §470.05(2). That amendment, which has not been fully interpreted by the New York courts, requires the court's ruling on a question raised on appeal to have been made "in response to a protest by a party." Since the standing issue was not raised by either party, the court's decision was not made in response to a protest by either party.

decision "rests equally on independent state grounds: that defendant's rights under our State Constitution... were violated." Id. at 9 n.7. Thus, given this subsequent clarification of Mosley as resting as well upon independent state constitutional grounds, any decision by this Court as to the standing issue in Mosley would be an advisory opinion, as the truly independent state grounds were and will still be the mainstay of the Court's holding below. It is precisely to avoid the rendering of such an advisory opinion that this Court should conclude that an adequate and independent state ground supports the judgment below and that it lacks jurisdiction to review that judgment. Michigan v. Long, 463 U.S. 1032 (1983).

In sum, because the Mosley Court simply applied traditional, unexceptional rules of standing to the facts of this particular case, because that application depended on New York's statutory doctrine of constructive possession, and because the state court has since confirmed that an independent state ground exists for its holding, the question petitioner raises is neither reviewable nor worthy of review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

PHILIP L. WEINSTEIN
Attorney for Respondent
The Legal Aid Society
15 Park Row - 18th FLoor
New York, New York 10038
(212) 577-3420

KAREN M. KALIKOW
Of Counsel
May, 1987

State of New York
Court of Appeals

---

1 No. 76
The People &c.,
Respondent,
v.
Hector Millan,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports

(76) John T. McClintock & Norman L. Reimer, NY City for appellant.
Robert Morgenthau,DA,NY County(Eleanor J. Ostrow & Norman Barclay of counsel) for respondent.

HANCOCK, JR., J.

The People charged defendant with criminal possession of a weapon solely on the basis of the statutory presumption of possession (Penal Law § 265.15[3])[1] arising from the fact that the weapon was discovered in the passenger compartment of the taxicab in which he was riding. We hold that under these circumstances the People's imputation of constructive possession

---

1. Penal Law § 265.15(3) states in pertinent part:

> "The presence in an automobile other than a stolen one or a public omnibus, of any firearm *** is presumptive evidence of its possession by all persons occupying at the times such weapon *** is found".

of the weapon to defendant as the predicate for the crime with which he was charged constituted a sufficient basis for defendant to challenge the police conduct in searching the passenger compartment of the cab. Moreover, irrespective of his right to challenge the search, defendant, as a passenger in the cab, had a right to contest the legality of the stop of the cab and to seek suppression of the weapon as the product of that allegedly unlawful police conduct. On the moving papers presented to it, the suppression court should not have denied suppression without according defendant a hearing on these issues.

I

Defendant seeks a reversal of his conviction for criminal possession of a weapon, third degree. On the evening of June 15, 1984, defendant and two companions, Hector Colon and Anthony Veggacada, were riding in a taxicab near the intersection of 112th Street and 5th Avenue in Manhattan.[2] Plainclothes police officers assigned to the street crime unit and travelling in a yellow medallion taxi directed the driver of defendant's cab to pull over. The three occupants were ordered out of the passenger compartment and searched without their consent. When the police, in searching the interior of the cab, discovered a gun in a black leather bag resting on the back seat, they placed the passengers under arrest and charged them with its possession. The explanation for the arrest given by the prosecutor, as related in the decision of the suppression court, was that "the police saw [defendant, Colon and Veggacada] seated in the back of a livery cab and approached. The police claimed the [three

---

2. The facts as related here are essentially those set forth in the decision of the suppression court denying defendant's motion and in the moving papers before that court. The court held no hearing and made no findings. Our statement must be viewed as a recitation of allegations only.

occupants] made 'suspicious moves' and, accordingly, the People assert, [they] were ordered out of the cab." Defendant's motion to suppress the weapon because of the illegality of the stop and search was denied without a hearing.

In the jury trial which followed, as in the proceedings before the suppression court, there was no evidence that defendant owned the gun or knew of its presence; the only basis for guilt was the statutory rule that the presence of a gun in an automobile "is presumptive evidence of its possession by all persons occupying such automobile at the time *** [it] is found" (Penal Law § 265.15[3]).[3] After defendant was convicted of the gun possession charge, the Appellate Division affirmed with a divided court (118 AD2d 236).

The contentions of defendant which we address concern the propriety of the court's denial without a hearing of his motion to suppress the weapon. Noting that defendant disavowed any interest or claim of a privacy right in the bag and that "automatic standing" is no longer the rule in New York (People v Ponder, 54 NY2d 160), the suppression court held that defendant lacked standing to contest the search of the passenger compartment. It concluded that his rights as a passenger in a taxicab were no greater than the rights of the passenger in the private automobile involved in Rakas v Illinois (439 US 128) and reasoned that defendant could, therefore, claim no right of privacy in the area searched. It also determined that there was an insufficient showing that the seizure of the gun resulted directly from the stop. Thus, his claim that the stop had been unlawful could provide no basis for suppression.

---

3. In its jury charge during the trial of defendant, Colon and Veggacada for weapon possession, third degree, the court stated: (Cont'd.)

The Appellate Division majority, in its opinion, agreed that Rakas was controlling on the question of defendant's right of privacy in the passenger compartment of the cab and rejected defendant's argument that under Rios v United States (364 US 253) "a taxicab passenger has greater standing to object to a search of the taxicab than the passengers in Rakas had to contest the search of a private car" (118 AD2d 236, 242 n 3). It also agreed that there was no ground for suppression of the gun as the product of the allegedly unlawful stop, finding on its review of the trial record a sufficient showing "that the taxicab in which defendant was a passenger passed a red light and that the stop was justified" (118 AD2d 236, 244).[4]

For reasons stated hereafter, there should be a modification. Defendant should have the right to a suppression hearing at which he may, if he chooses, contest the legality of the conduct of the police both in making the initial stop and in searching the interior of the cab.

II

The critical factor in our analysis of defendant's right to challenge the search is that the charge against him was founded only on the statutory presumption arising from the facts that he was riding in the passenger compartment of the cab and that the gun was subsequently found in the passenger compartment.

(Cont'd.)
"Seems to me that there's absolutely no other evidence in the case as to Millan other than the presumption which would permit you to find Millan guilty."

4. The Appellate Division's use of the trial testimony for the purpose of supporting the determination of the suppression court in denying the motion was contrary to established precedent (see, e.g., People v James, 67 NY2d 662, 664; People v Dodt, 61 NY2d 408, 417; People v Gonzalez, 55 NY2d 720, 721, cert denied 456 US 1010). The papers before the suppression court contain no reference to any traffic violation or other conduct of the cab driver which would constitute a reason for the stop.

We hold simply that the People may not predicate defendant's guilt solely on the constructive possession of the weapon attributed to him as a passenger in the cab based on the presumption (Penal Law § 265.15[3]) and simultaneously deprive him of the right to challenge the search. In a recent decision, People v Mosley (68 NY2d 881), we applied the same rationale where the police based their claimed probable cause for arresting defendant on their discovery of a starter pistol on the person of his companion, Mackie. In holding that defendant could question the lawfulness of his arrest by challenging the asserted basis for it--the search of his companion--we stated that "[i]nasmuch as the People rel[ied] on the discovery of the starter pistol on Mackie as the basis for the arrest of defendant--that defendant constructively possessed the weapon concealed on Mackie's person--defendant ha[d] standing to contest the frisk of Mackie" (id.at 883; emphasis added).

The holding here is in no way inconsistent with our decision in People v Ponder (54 NY2d 160). In Ponder we adopted the Supreme Court's ruling in United States v Salvucci (448 US 83) abrogating the so-called "automatic standing rule" established in Jones v United States (363 US 257), under which a defendant charged with a possessory crime was permitted to challenge the legality of the search without regard to whether he had an expectation of privacy in the premises searched and without alleging any possessory interest in the items seized.

Here defendant does not ground his right to contest the legality of the search on any asserted right to possess the gun or on any claim that merely because he was accused in the indictment of a crime of possessing it he should have "automatic standing". His asserted right to question the legality of the search rests entirely on the circumstances giving rise to the presumption.

Our holding that defendant had a right to challenge the search of the taxicab on constitutional grounds is based on our analysis of applicable federal and state authorities (see, United States v Salvucci, 448 US 83, 88, supra; Rios v United States, 364 US 253, 262, n 6, supra; People v Mosley, 68 NY2d 881, supra; People v Ponder, 54 NY2d 160, supra) and on our conclusion that to deny a defendant a hearing under these circumstances would be repugnant to the requirements of fair play which have "evolved through centuries of Anglo-American constitutional history", particularly as applied to the relationship "between the individual and government" (Anti-Fascist Committee v McGrath, 341 US 123, 162, Frankfurter, J., concurring; see, Wardius v Oregon, 412 US 470, 475-476; Malinski v New York, 324 US 401, 414-415; Lisenba v California, 314 US 219, 236; People v Isaacson, 44 NY2d 511, 520). The rule the People would have us sanction is this: the government, through its agents, may search a taxicab and, upon finding a gun, use the legal fiction of constructive possession to prosecute all passengers, conscious or not of the gun's existence, and yet deny those it accuses a right to question the actions of its agents in conducting the search. Such a rule offends fundamental tenets of fairness inherent in New York criminal jurisprudence (see, NY Const art I, § 6; People v Acevedo, __NY2d__ [PU]; People v Mosley, 68 NY2d 881, supra; People v Isaacson, supra; People v Brown, 40 NY2d 381) and we reject it.[5]

---

5. Because our decision that defendant had a right to challenge the search of the cab depends upon the fact that he was charged with constructive possession of a weapon under the presumption (Penal Law §265.15[3]) and because our holding that he has a right to contest the search of the cab is limited to that situation, it is unnecessary to reach the issue addressed in the briefs and at argument whether, under other circumstances, defendant as a passenger in a cab would have had a right of (Cont'd.)

III

Before the suppression court defendant urged a separate and independent basis for excluding the gun: that irrespective of the legality of the police actions in searching the cab, their actions in stopping it were unjustified and the gun should be suppressed as the product of the unlawful stop. As a passenger, defendant had standing to contest the stop of the vehicle and he, therefore, should have been given a hearing on this issue as well.[6]

The exclusionary rule generally bars from trial all "physical, tangible materials obtained either during or as a direct result of an unlawful invasion" (Wong Sun v United States, 371 US 471, 485; People v Bethea, 67 NY2d 364; People v Johnson, 66 NY2d 398; People v Bigelow, 66 NY2d 417; People v Gokey, 60 NY2d 309; People v Elwell, 50 NY2d 231; cf. People v Arnau, 58 NY2d 27). As noted in People v Stith and Newton (__NY2d__ [decided March 26, 1987]), there are circumstances when the exclusionary rule will not be applied: when, for example, the evidence "is gained from an independent source" (Silverthorne Lumber Co. v United States, 251 US 385, 392), or when "the detrimental consequences of illegal police action [become] so

---

(Cont'd.)
privacy in the passenger compartment (see, Rakas v Illinois, supra). We do not decide that issue.

6. The People's arguments that defendant had no standing to challenge the search of the cab have no bearing on defendant's right to contest the stop. As pointed out by Professors LaFave and Israel, Rakas "should not be taken to mean that persons who are 'merely passengers' will never have standing" and, as two concurring and four dissenting justices in Rakas recognized, "a passenger does have standing to object [to alleged police misconduct]. If either the stopping of the car or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit" (1 LaFave and Israel, Criminal Procedure, § 9.1, p 726; emphasis in original).

attenuated" that the taint of the initial misconduct is dissipated (Brown v Illinois, 422 US 590, 609 [Powell, J. concurring in part]).

Here, from the information before the suppression court, it appears that the police actions in stopping the cab, ordering the defendant to get out, searching him without his consent, searching the back of the cab, opening the bag and finding the gun constituted one continuous chain of events. There was nothing before the suppression court to show that the taint of the allegedly improper stop had become attenuated, that the gun would have been independently discovered or that for any other reason the gun was not "come at by exploitation of that illegality" (Wong Sun, supra, at 488, quoting J. Maguire, Evidence of Guilt, 221 [1959]). Under federal and New York constitutional law it was error to deny a hearing on the issue of the stop.

Contrary to the People's contentions the moving papers were minimally sufficient to warrant a hearing. In any event, as noted by the dissent at the Appellate Division (118 AD2d 236, 247) it is clear from the suppression court's written decision that its reason for denying the motion "had nothing to do with the sufficiency of defendant's papers, but, rather, had to do with defendant's alleged lack of standing to challenge the seizure of the gun" and that "any objection to the sufficiency of the papers [was] waived."

The order of the Appellate Division should be modified and the case remitted to Supreme Court, New York County, for a suppression hearing and in the event that defendant prevails thereon, for dismissal of the indictment; in the event that the People prevail, the judgment should be amended to reflect that

result. As so modified, the order appealed from should be affirmed.[7]

---

7. Our decision to reverse and to require a hearing on the legality of both the stop and the search, while based on our analysis of federal constitutional law, rests equally on independent state grounds: that defendant's rights under our State Constitution (NY Const, art 1, §§ 6, 12) were violated (see, Michigan v Long, 463 US 1032, 1041-1042; People v Stith and Newton, supra, Slip opn at p 2, n 1).

BELLACOSA, J. (dissenting):

My vote to affirm this gun possession conviction is based on simply articulated differences from the majority.

I do not believe that good practice, controlling precedents or sound constitutional imperatives require a suppression hearing when a taxi cab passenger asserts an insufficient legal and factual basis for recognized standing to challenge the stop of the cab or to be accorded an expectation of privacy in the contents of a zippered bag in the back passenger compartment of the cab.

Defendant alleged merely that the taxicab was stopped "despite the fact that they [the police] had no reason to believe that any of the occupants of the vehicle had committed a crime or were committing a crime at the time of the arrest" and that the police "recovered a gun from the rear passenger area of the cab". The suppression court, with only this boilerplate language before it, denied the suppression motion without a hearing.

The specific facts and circumstances leading up to the arrest were not developed until trial. Late one evening defendant Millan and two companions were passengers in the back seat of a livery cab traveling in an area suffering from a reputation for robberies of taxicabs. Two police officers assigned to the Taxi Robbery Squad stopped the cab because they believed that the cab driver was signaling for help by a recognized technique of driving at an excessive speed and passing through a red light. As the two officers approached the cab, the passengers made

"furtive" movements and one was overheard stating, "You don't do things like that, be cool". The police ordered the three men out of the cab and patted them down. One officer then looked in the back seat and recovered a zippered bag. When asked who owned the bag, none of the passengers responded. The bag was opened and contained a loaded semiautomatic pistol. The three men were charged with its possession.

I agree that the court may not use post mortem facts developed at a trial to infuse life or legitimacy into a previously decided suppression matter (People v Gonzalez, 55 NY2d 720; see also, People v Dodt, 61 NY2d 408, 417; People v Wilkins, 65 NY2d 172, 180; People v James, 67 NY2d 662). The only relevancy in reciting these facts of the case is to show that had defendant fulfilled his pleading burden at the suppression stage, there would have been a hearing with ample facts, in my view, to deny suppression.

In People v Gruden (42 NY2d 214), this Court concluded that "[g]enerally hearings are not available merely for the asking [and] [w]e therefore hold that the court may summarily grant a motion to dismiss unless the papers submitted by the prosecutor show that there is a factual dispute which must be resolved at a hearing" (supra, at 217). In People v Weaver (49 NY2d 1012), we specifically applied the Gruden holding in the suppression context, and in People v Lomax (50 NY2d 351) we applied the legal reasoning behind Gruden's holding to the summary denial of a defendant's motion to dismiss without an evidentiary hearing.

Even if we assume that defendant derived standing from his meager papers to challenge the stop of a cab within which he was a passenger, the conclusory allegations contained in his omnibus motion were insufficient at the next step of analysis to

establish a factual issue requiring a hearing on the merits. The defendant's allegation that the taxicab was stopped despite the fact that no crime was being committed overlooked the totally legitimate possibility that the vehicle could have been stopped for a traffic violation based upon a very minimal factual basis supporting reasonable suspicion (People v Ingle, 36 NY2d 413, 414-415).

It is my view that a regulated vehicle on a city street, under the spare facts presented to the suppression court, may be stopped within constitutional limitations subject to standing challenge only by the driver in this case and not by all the passengers.

The majority goes further however, and again I respectfully disagree, because even if the stop were to be deemed subject to challenge by this defendant he does not automatically acquire a legitimate, recognized, reasonable expectation or entitlement to privacy to the compartment or contents in the back of that cab. I had thought that was plainly decided in the People's favor under Rakas v Illinois (439 US 128) and sundry other cases (see, e.g., United States v Salvucci, 448 US 83; People v Rodriguez, 69 NY2d 159; People v David L., 56 NY2d 698, cert denied 459 US 886; People v Hunter, 55 NY2d 930; People v Ponder, 54 NY2d 160; People v Osmond, 109 AD2d 896). The majority casts considerable doubt on these cases by failing in its effort to distinguish some of them and by ignoring others of them completely.

Finally, the majority seems to be rebelling unnecessarily against this cogent line of precedents that are delicately balanced on respect for search and seizure rights, a respect which I fully share, and on an appreciation of the reasonableness component embedded in that right. That reasonableness aspect compels my

conclusion on the particular facts of this case that defendant did not do enough at the pleading outset of this prosecution to warrant a suppression hearing on standing as to the stop or the search.

The irony for the People is that had defendant done so he would surely have lost on the merits, but by holding back he successfully finesses that into an unreasonable victory at the appellate stage.

* * * * * * * * * * * * * * * * * *

Order modified and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Hancock in which Chief Judge Wachtler and Judges Simons, Kaye and Titone concur. Judge Bellacosa dissents and votes to affirm in an opinion. Judge Alexander took no part.

Decided May 7, 1987

State of New York
Court of Appeals

3 No. 78
The People &c.,
Respondent,
v.
Otis Stith and Cardell Newton,
Appellants.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports

(78)Isabelle Rawlon, South Fallsburg, for appellant Stith.
Steven S. Katz, Liberty, for appellant Newton.
Stephen F. Lungen,DA, Sullivan County(Bonnie Mitzner of counsel), for respondent.

HANCOCK, JR., J.

Defendants were arrested and charged with criminal possession of a weapon when police officers discovered a loaded gun in a concededly unlawful search of the cab of a truck tractor following a traffic stop. Later, after it was discovered that the tractor was stolen, defendants were also charged with criminal possession of stolen property. In defendants' appeals from convictions on both charges, they argue that it was error to deny their motions to suppress the gun. The suppression court and the Appellate Division agreed that the search and seizure were in violation of defendants' constitutional rights. Nevertheless, both courts, applying the inevitable discovery rule, held that the evidence should not be excluded, reasoning that the gun would

inevitably have been discovered during the inventory search following defendants' arrest when, as would shortly have been revealed in a routine registration check, the police learned that the truck was stolen. The sole issue is whether the inevitable discovery exception to the exclusionary rule was properly invoked in these circumstances. Because we conclude that it was not, the order of the Appellate Division should be modified.[1] The convictions for criminal possession of a weapon in the third degree should be reversed, the motions to suppress granted, and the weapon possession count in the indictment should be dismissed. The convictions for criminal possession of stolen property in the first degree should, however, be affirmed.

I

State Troopers Clifford and Figueroa, patrolling New York State Route 17 near Liberty, stopped defendants' truck tractor for speeding. Clifford asked the driver, defendant Newton, for a driver's license and registration. Newton produced a Connecticut driver's license, but was unable to locate a

---

1. The conclusions that the evidence should have been suppressed under the application of the exclusionary rule and that the inevitable discovery exception does not apply rest on our analysis of applicable federal decisions (see, Nix v Williams, 467 US 531; Brown v Illinois, 422 US 590; Wong Sun v United States, 371 US 471; Silverthorne Lumber Co. v United States, 251 US 485). We reach the same conclusions by applying the exclusionary rule established under our State law (see, People v Bethea, 67 NY2d 364; People v Johnson, 66 NY2d 398; People v Bigelow, 66 NY2d 417; People v Gokey, 60 NY2d 309; People v Elwell, 50 NY2d 231; cf. People v Arnau, 58 NY2d 27), our New York cases enunciating the inevitable discovery doctrine (see, People v Payton, 45 NY2d 300; People v Fitzpatrick, 32 NY2d 499; cf. People v Knapp, 52 NY2d 689), and non-federal decisions and other authorities which we find persuasive (see, State v Crossen, 536 P2d 1263 [Ore. App.]; see also 3 W. LaFave, Search and Seizure § 11.4, at 620-628). Our decision to reverse, therefore, while based on our analysis of federal law rests equally on an "adequate and independent" state ground (Michigan v Long, 463 US 1032, 1041-1042): that defendants' rights under our State Constitution (NY Const, art 1, § 12) were violated.

registration for the truck in the piles of papers strewn about the cab. Dissatisfied with Newton's attempts to find the registration, Clifford ordered Newton out of the truck and climbed in the driver's side to conduct his own search. Clifford saw a brown vinyl bag on the console between the seats. A logbook portfolio stuck out from an unzippered side pocket of the bag. On removing the portfolio, Clifford noticed the butt of a revolver inside the pocket. The troopers arrested both defendants for criminal possession of a weapon, handcuffed them, put them in the back of the police car, and took them to the Ferndale State Police barracks. On the trip to Ferndale, a radio check showed Newton's license to have expired and the truck to be stolen. Defendants were then charged with criminal possession of stolen property.

II

The exclusionary rule generally bars "from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion" (Wong Sun v United States, 371 US 471, 485; see, People v Bethea, 67 NY2d 364; People v Johnson, 66 NY2d 398; People v Bigelow, 66 NY2d 417; People v Gokey, 60 NY2d 309; People v Elwell, 50 NY2d 231; cf. People v Arnau, 58 NY2d 27). A prime purpose of the rule is to deter police misconduct (see, Nix v Williams, 467 US 431, 442-443; People v Bigelow, 66 NY2d 417, 427). It has been recognized, however, "that in some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes" (Brown v Illinois, 422 US 590, 608-609 [Powell, J., concurring in part]). Thus, courts have held that evidence should not be suppressed if knowledge of it "is gained from an independent source" (Silverthorne Lumber Co. v

United States, 251 US 385, 392; People v Arnau, 58 NY2d 27). Similarly, "the detrimental consequences of illegal police action [may] become so attenuated" that the taint of the initial misconduct is dissipated (Brown, supra, p 609). Sufficient attenuation to avoid application of the exclusionary rule has been found when the linkage between the police misconduct and that evidence is interrupted by intervening events (see e.g., Wong Sun v United States, supra, p 491; People v Graham, 98 AD2d 198, 200-203, cert denied 464 US 896) or becomes overly extended and weakened by passage of time (see e.g., People v Minley, 112 AD2d 712, affd 68 NY2d 952; People v Miller, 105 AD2d 1127, 1128; see generally, 3 W. LaFave, Search and Seizure § 11.4, at 614-621). The question is "whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint" (Wong Sun, supra, p 488, quoting J. Maguire, Evidence of Guilt, 221 [1959]).

Applying this same rationale courts have refused to suppress evidence if it can be shown by "a very high degree of probability" (People v Payton, 45 NY2d 300, 313, revd 445 US 573, on remand 51 NY2d 169) that the evidence sought to be suppressed would inevitably have been discovered irrespective of the initial wrong. Like the independent source and attenuated connection exceptions to the exclusionary rule, the inevitable discovery exception is based on the perception that in certain circumstances the interest of society is better served by having relevant and material evidence admitted in criminal cases than by deterring police misconduct through the exclusion of evidence unlawfully acquired (see, Nix v Williams, 467 US 431, 442-443, supra).

Although the inevitable discovery rule has for several years been established law in this state (see, People v Payton, supra; People v Fitzpatrick, 32 NY2d 499; cf., People v Knapp, 52 NY2d 689), our court has never applied the rule where, as here, the evidence sought to be suppressed is the very evidence obtained in the illegal search. In People v Fitzpatrick, supra, and People v Payton, supra, as in Nix v Williams, supra, the evidence saved from suppression by the inevitable discovery rule was not evidence illegally obtained during or as the immediate consequence of the challenged police conduct. It was evidence obtained indirectly as a result of leads or information gained from that primary evidence. In Fitzpatrick, for example, the evidence the court declined to exclude was a gun found in a closet as a result of information obtained in an illegally acquired statement. In Payton we applied the rule to information linking the defendant to the murder weapon which was discovered by tracing a sales slip found in the initial illegal search. Similarly, in Nix v Williams the Supreme Court, in adopting the inevitable discovery rule, held that evidence obtained through defendant's illegally elicited statements (the location of the body of the victim) should not have been suppressed because it would inevitably have been discovered in a search which was already in progress.

When the inevitable discovery rule is applied to secondary evidence, as in Payton, Fitzpatrick, and Nix, the effect is not to excuse the unlawful police actions by admitting what was obtained as a direct result of the initial misconduct. It is not the tainted evidence that is admitted, but only what was found as a result of information or leads gleaned from that evidence. The rationale is that when the secondary evidence would have been found independently in any event, "the prosecution [should not be] put in a worse position simply because of some

earlier police error or misconduct" (Nix, supra, p 443; emphasis in original). In contrast, when the inevitable discovery rule is applied to primary evidence, as was done here, the result is quite different. It is the tainted evidence itself and not the product of that evidence which is saved from exclusion. Permitting its admission in evidence effects what amounts to an after-the-fact purging of the initial wrongful conduct, and it can never be claimed that a lapse of time or the occurrence of intervening events has attenuated the connection between the evidence ultimately acquired and the initial misconduct. The illegal conduct and the seizure of the evidence are one and the same.

In the case before us, the suppression court and the Appellate Division, in holding that the illegally seized weapon should not be suppressed, hypothesized that the gun would inevitably have been discovered through a source that was independent of the initial taint. Viewing the situation at the moment of the illegal seizure, the courts below simply assumed the chain of events which would customarily have been set in motion following defendant Newton's failure to produce a registration certificate: that a radio check would have revealed that the truck was stolen, defendants would have been arrested, the truck would have been impounded and the gun would have been found in an inventory search.

We hold that applying the inevitable discovery rule in these circumstances, and effecting what would amount to a post hoc rationalization of the initial wrong (see, Nix, supra, at 448), would be an unacceptable dilution of the exclusionary rule. It would defeat a primary purpose of that rule, deterrence of police misconduct (see, People v Bigelow, 66 NY2d 417, 427, supra). As noted by the Oregon Court of Appeals in State v Crossen (536 P2d 1263, 1264), in declining to apply the

inevitable discovery rule to primary as distinguished from secondary evidence, failing to exclude wrongfully obtained primary evidence "would encourage unlawful searches in the hope that probable cause would be developed after the fact" (see, United States v Massey, 473 F Supp 843, 852-854; Stokes v State, 423 A2d 552 [Md Ct App]; State v Williams, 285 NW2d 248, 256-257 [Iowa]; contra, Clough v State, 555 P2d 840 [Nev]; for a discussion of the distinction between primary and secondary evidence, see 3 W. LaFave, Search and Seizure § 11.4, at 620-628).

The People's argument that defendants lacked standing to contest the lawfulness of the seizure was raised for the first time at the Appellate Division and thus is not preserved for our review. We have examined defendant Newton's other argument and found it to be without merit.

Accordingly, the order of the Appellate Division should be modified by granting defendants' motions to suppress the gun, vacating the convictions and sentences for criminal possession of a weapon in the third degree and dismissing that count of the indictment and, as so modified, affirmed.

* * * * * * * * * * * * * * * * *

Order modified in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Hancock. Chief Judge Wachtler and Judges Simons, Kaye, Titone and Bellacosa concur. Judge Alexander took no part.

Decided March 26, 1987